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Supreme Court, U.S.
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No. 94-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARYNELL SNEAD, GAIL MORRIS,
Petitioners,

v.

GOODYEAR TIRE AND RUBBER COMPANY,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should depart from recent Supreme Court precedent, the consistent holdings of the Circuits, and the plain language of the statute and authorize the recovery of compensatory and punitive damages under 29 U.S.C. §1132(a)(3) in ERISA actions.

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OPINIONS BELOW

The decision by the Court of Appeals for the Eleventh Circuit in *Marynell Snead, Gail Morris v. Goodyear Tire and Rubber Co.*, Appeal No. 94-6048 (December 9, 1994) is unpublished. A copy is set forth in the Appendix on pages A-1 through A-2. The Final Judgment entered on December 17, 1993 and the Findings of Fact and Conclusions of Law entered on October 21, 1993 in Civil Action No. CV-92-PT-2082-M by the United States District Court for the Northern District of Alabama are set forth in the Appendix on pages A-3 through A-15.

RELEVANT STATUTE

Since in this case petitioners urge the Court to depart from the plain language of the ERISA civil enforcement statute, it is appropriate to set out the precise language of the statute. 29 U.S.C. §1132(a) provides in its entirety as follows:

(a) *Persons empowered to bring a civil action*

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for the appropriate relief under section 1109 of this title;

(3) *by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;*

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act

or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection. (emphasis added).

STATEMENT OF THE CASE

This case arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. (ERISA). Petitioners were (and are now again) Plant Nurses at respondent Goodyear Tire and Rubber Company's plant in Gadsden, Alabama. A decision having been made to use contract Nurses on the shifts on which the petitioners were employed, they were offered but declined the opportunity to continue working as contract Nurses. Following their rejection of the offer, they were laid off and replaced by contract Nurses in October 1991. As a result of the District Court's ruling in this case, they were reinstated in January 1994 to the Plant Nurse job, where they remain employed.

Following their layoff in October 1991, they filed a multi-count complaint in State Court alleging violations of ERISA, fraud, the tort of outrage (intentional infliction of emotional

distress), and breach of contract. After removal to Federal Court, they voluntarily dismissed the fraud and outrage counts. The breach of contract counts were dismissed on summary judgment.

The case was tried at bench trial on the ERISA claims. The District Court entered findings of fact and conclusions of law on October 21, 1993 in favor of petitioners on their ERISA claims. (A -7-15). Applying this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) and Circuit precedent, the Court held that petitioners were not entitled to compensatory and punitive damages pursuant to 29 U.S.C. §1132(a)(3). (A - 12, 13-14). Final Judgment was entered on December 17, 1993 (A -3-6) granting the following equitable relief to petitioners:

> (a) They were ordered reinstated to employment, credited with full service as though they had not been terminated. (A - 3).
>
> (b) Respondent was ordered to grant them the employee benefits with which they would have been credited had they remained employed, including retroactive contributions to the pension plan, the savings plan, and credit for vacation pay. (A - 4-5).
>
> (c) Respondent was ordered to reimburse them for medical expenses they incurred which would have been covered by the employee health insurance plan. (A - 4).
>
> (d) They were awarded back pay, reduced by the amount they would have earned if they had accepted the offer to continue working as contract Nurses. (A - 5).
>
> (e) Their counsel received an attorneys' fee award, the amount being arrived at by agreement.

They then appealed to the Eleventh Circuit on the issues of (a)whether ERISA authorizes compensatory and punitive dam-

ages and (b)whether it was within the Trial Court's discretion to reduce the back pay award by the amount they would have earned had they accepted the offer to continue working. The Court of Appeals affirmed on both issues. On the only issue raised by the petition for certiorari — whether ERISA provides for compensatory and punitive damages — the Court of Appeals held that:[1]

> "Because the plaintiffs' arguments for compensatory and punitive damages are at odds with both Supreme Court and circuit precedent establishing that ERISA does not authorize such damages, we affirm the district court's judgment on this issue." (A - 1-2).[2]

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[1] Petitioners do not contest the Court of Appeals' decision on the reduction of back pay by the amount they would have earned if they had not rejected the offer to continue working.

[2] The Court cited *Mertens v. Hewitt Associates*, 508 U.S. _____, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), and *Bishop v. Osborn Transportation*, 838 F.2d 1173 (11th Cir. 1988), *cert. denied*, 488 U.S. 832 (1988).

REASONS FOR DENYING THE WRIT

By their petition for certiorari, petitioners are asking this Court to re-visit an issue which it conclusively decided only two years ago in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) and which the Courts of Appeals have resolved consistently and without conflict. Petitioners are further asking this Court to grant certiorari for the purpose of judicially re-writing the plain and express language of a statute. For these reasons, the petition for writ of certiorari is due to be denied.

I.

THE SUPREME COURT HAS ALREADY DECIDED THE ISSUE

The issue on which petitioners urge certiorari is whether the ERISA civil enforcement statute, 29 U.S.C. §1132(a), authorizes the recovery of compensatory and punitive damages. This precise issue was considered and decided in 1993 in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). The holding in *Mertens* — that ERISA does not authorize an action for damages against a nonfiduciary for alleged participation in a breach of fiduciary duty — was premised on the Court's conclusion that the term "equitable relief" in §1132(a)(3) does not encompass compensatory damages. The Court stated as follows:

> "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, or course, the classic form of *legal* relief. *Curtis v. Loether*, 415 U.S. 189, 196 ... (1974); *Teamsters v. Terry*, 494 U.S. 558, 570-571 ... (1990); *D. Dobbs*, Remedies §1.1, p. 3 (1973). And though we have never interpreted the precise phrase 'other appropriate equitable relief,' we have construed the similar language of

> Title VII of the Civil Rights Act of 1964 (before its 1991 amendments) — 'any other equitable relief as the court may deem appropriate,' 42 U.S.C. §2000e-5(g) — to preclude 'awards for compensatory or punitive damages.' *United States v. Burke*, 504 U.S. ___, ___, 119 L.Ed.2d 34, 112 S.Ct. 1867 (1992)." (508 U.S. at ___, 124 L.Ed.2d at 169-70).

The holding in *Mertens* that §1132(a)(3) does not authorize recovery of extra-contractual damages is squarely on point and dispositive of this case. Given this Court's resolution of the issue raised here in *Mertens*, there is absolutely no reason to grant a writ of certiorari.

Petitioners attempt to sidestep *Mertens* by arguing that it involved a non-fiduciary's potential liability for participation in a breach of fiduciary duty while this case involves a termination of employment contrary to 29 U.S.C. §1140. Their theory is that this Court has never explicitly ruled on the availability of compensatory and punitive damages under §1132(a)(3) in the context of a §1140 suit.[3]

The distinction sought to be drawn by petitioners between the remedies sought in *Mertens* and the remedies available in a §1140 suit simply does not exist. The potential remedies are the same both in the context of a non-fiduciary's liability for breach of fiduciary duty and in the context of a §1140 suit. The petitioners in *Mertens* relied exclusively on §1132(a)(3) as support for their contention that extra-contractual damages were

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[3] Petitioners' brief states that "because *Mertens* analyzed only a nonfiduciary's liability for knowing participation in breach of §1109 duties, courts cannot properly rely on the *Mertens* decision for the proposition that extra-contractual damages are not permitted for §1140 violations." (Petitioners' brief pp. 20-21).

available.[4] Similarly, petitioners here also rely solely on §1132(a)(3) in support of their claim for extra-contractual damages. (A - 12, 13). Since *Mertens* held that extra-contractual damages are not available under §1132(a)(3), it follows that they are not available under §1132(a)(3) regardless of the nature of the underlying claim.

Accordingly, a grant of certiorari in this case would serve only to re-tread a worn path with needless repetition of an established principle.

II.

THE PLAIN TERMS OF THE STATUTE

The result which this Court reached in *Mertens* and which the Court of Appeals applied in the present case accurately reflects the plain terms of the statute. Section 1132(a)(3) is phrased solely in terms of suits "to obtain other appropriate *equitable* relief," and makes no mention of money damages. This Court has previously held that remedies not expressly mentioned in the ERISA enforcement statute are not to be inferred. In *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), the Court stated as follows:

> "The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not

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[4] The Court in *Mertens* stated as follows: "Lacking equivalent provisions specifying *non*fiduciaries as potential defendants, or damages as a remedy available against them, petitioners have turned to §502(a)(3), 29 U.S.C. §1132(a)(3) ...." (508 U.S. at _____, 124 L.Ed.2d at 168). The Court further characterized petitioners' reliance on §1132(a)(3) as follows: "Petitioners contend that requiring respondents to make the Kaiser plan whole ... would constitute 'other appropriate equitable relief' within the meaning of §502(a)(3)," and "[p]etitioners maintain that the object of their suit is 'appropriate *equitable* relief' under §502(a)(3)." (508 U.S. at _____, 124 L.Ed.2d at 168, 169) (emphasis in original).

intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 361 ... (1980).

* * *

"We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 ... (1979): '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'

* * *

"In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence — in the statute itself and in its legislative history — of any reference to an intention to authorize the recovery of extra-contractual damages." (473 U.S. at 146-148) (footnotes omitted).

Accordingly, petitioners are asking the Court not only to depart from the recent resolution of the issue in *Mertens* but further to re-write the statute.

III.

NO CIRCUIT SPLIT

There is furthermore no reason to grant certiorari in this case because there is no conflict among the Courts of Appeals which have considered the issue of the availability of compensatory and punitive damages under §1132(a)(3). The Circuits consistently hold that such damages are not authorized, as shown by the following:

First Circuit: *Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied* 488 U.S. 909 (1988).

Second Circuit: *Mullins v. Pfizer, Inc.*, 23 F.2d 663, 666 (2nd Cir. 1994).

Fourth Circuit: *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Fifth Circuit: *Medina v. Anthem Life Insurance Co.*, 983 F.2d 29, 32-3 (5th Cir.), *cert. denied*, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993); *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1338 (5th Cir.), *cert. denied*, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1462-64 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 and 479 U.S. 1089 (1987).

Sixth Circuit: *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987).

Seventh Circuit: *Harsch v. Eisenburg*, 956 F.2d 651, 656-57 (7th Cir.), *cert. denied*, 113 S.Ct. 61, 121 L.Ed.2d 29 (1993); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 626-27 (7th Cir. 1987).

Eighth Circuit: *Novak v. Andersen Corp.*, 962 F.2d 757, 759-60 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 2928, 124 L.Ed.2d 678 (1993).

Ninth Circuit: *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986).

Tenth Circuit: *Lafoy v. HMO Colorado*, 988 F.2d 97, 100 (10th Cir. 1993).

Eleventh Circuit: *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173, 1174 (11th Cir.), *cert. denied*, 488 U.S. 832 (1988);

McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 (11th Cir.), *reh'g denied*, 931 F.2d 1021 (11th Cir. 1991).

In light of this consistent body of Circuit precedent, it is inexplicable for petitioners to argue that there is an "interpretive gap" that "will continue to plague the lower courts" because they "will be unable to confidently assess what damages should lie for a nonfiduciary's willful breach of the statute." (Petitioners' brief p. 21). If there is an interpretive gap, the Courts of Appeals are unaware of it. Indeed, every Circuit Court which has considered the issue after *Mertens* has interpreted *Mertens* to foreclose the availability of compensatory and punitive damages. *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 666 (2nd Cir. 1994) ("ERISA does not authorize suits for money damages against nonfiduciaries."); *Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc.*, 39 F.3d 784, 787-88 (7th Cir. 1994) (*Mertens* forecloses recovery of monetary amounts for a claims administrator's breach of fiduciary duty); *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994) (reversing award of compensatory damages under §1132(a)(3) in light of *Mertens*) (petition for certiorari filed March 6, 1995 (63 USLW 3672)); *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1520 (9th Cir. 1993) ("As the Supreme Court recently held, equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. §1132(a)(3) ... ."). No useful purpose would be served by again reviewing an issue which the Courts have accurately held was resolved by *Mertens*.

Moreover, the "interpretative gap" argument advanced by petitioners is nothing more than a repetition of their misplaced argument that *Mertens* did not settle the issue and a contention that the remedies available in §1132 actions should vary depending on the type of claim being asserted in each case. In effect, petitioners are asking the Court to hold that compensatory and punitive damages are available for some ERISA claims and are not available for other ERISA claims, regardless of the fact that

the ERISA civil enforcement statute [§1132(a)] provides the same remedies for all causes of action. Petitioners' approach is both unnecessary and impracticable. It is unnecessary because the only remotely possible source of money damages under ERISA, for any ERISA cause of action, is §1132(a)(3), and *Mertens* has held that extra-contractual damages are not authorized by that section. It is impracticable because it would result in a hodgepodge of rules setting the stage for different types of relief under §1132(a)(3) depending on the nature of the underlying ERISA cause of action. There is no "interpretive gap" today, but there certainly would be if the petitioners' approach were followed. In sum, petitioners have advanced no reason why *Mertens* should not stand as the definitive interpretation of §1132(a)(3).

IV.

INGERSOLL-RAND DOES NOT CONSTITUTE APPROVAL OF COMPENSATORY AND PUNITIVE DAMAGES

In an argument best described as wishful thinking, petitioners say that *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) approved extra-contractual damages for §1140 violations. Petitioners' theory is that the term "relief" in the sentence "[i]t is clear that the relief requested here is well within the power of federal courts to provide" (498 U.S. at 145) refers to compensatory and punitive damages. Their idea is misplaced for the following reasons:

First, if *Ingersoll-Rand* meant that compensatory and punitive damages are authorized by ERISA, this Court obviously would at the least have considered that approach when it subsequently decided *Mertens*. Since there is no such consideration in *Mertens* (*See* 124 L.Ed.2d at 173), it logically follows that this Court does not share petitioners' view of *Ingersoll-Rand*.

Second, the Circuits which have considered this contention — the Fifth, Seventh, and Eleventh Circuits — are in agreement that

Ingersoll-Rand does not authorize compensatory or punitive damages. *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 1021 (11th Cir. 1991); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 61, 121 L.Ed.2d 29 (1992); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993). The interpretation placed on *Ingersoll-Rand* by these Circuit Courts is best set forth in *McRae*, *supra*, as follows:

> "The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The Supreme Court is not holding that the specific *remedies* this plaintiff had sought under state law are necessarily the remedies that will be afforded him should he be granted the *relief* under ERISA §502." (920 F.2d at 821, n. 7).

Third, even if *Ingersoll-Rand* were viewed as authority for compensatory and punitive damages, there would remain no reason to grant the certiorari petition in the present case. That is so because *Mertens*, decided after *Ingersoll-Rand*, provides the definitive resolution of the issue and supersedes any arguably inconsistent statements in *Ingersoll-Rand*. Being more recent, *Mertens* is the case which provides the guidance on the question of the availability of compensatory and punitive damages under §1132(a)(3).

CONCLUSION

There is no reason for this Court to grant the Petition for Writ of Certiorari. This Court has already ruled on the issue on which review is sought, the terms of the statute are plain, and there is no split of authority in the Circuit Courts of Appeals.

Accordingly, the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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